SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1102

BYRON HAHN, also known as SOON K. HAHN, and SUSAN HAHN, his wife,

Petitioners,

v.

JOHN W. BIHLMIRE, Assignee of Lloyd D. Miller, Assignee of First National Bank of Madison, Wisconsin, Guardian of Harry Newman, Incompetent,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court, State of Wisconsin

BRIEF FOR RESPONDENT IN OPPOSITION

IRVIN B. CHARNE
135 West Wells Street
Milwaukee, Wisconsin 53203
Attorney for Respondent,
John W. Bihlmire

HANNERSMITH-KORTMEYER CO. MILWAUKEE

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

(1) Does this Court have jurisdiction to review, on a petition for a writ of certiorari, the decision of the Wisconsin Supreme Court in the case of *Bihlmire v. Hahn, et al,* 31 Wis. (2d) 537, 143 N.W. (2d) 433 (1966)?

(2) Were petitioners denied a fair trial under the Fourteenth Amendment of the United States Constitution when, having knowledge of all relevant facts and having the right to secure a different judge, they chose not to do so and the judge did not disqualify himself on his own motion?

STATEMENT OF THE CASE

The respondent, in clarification and amplification of the statement of the case contained in the petition, would like to call to the Court's attention various facts involving the case at bar.

The foreclosure proceedings involving the property which is the subject matter of these proceedings, were instituted on December 23, 1953. On May 10, 1954, a judgment of foreclosure was entered in the amount of $8,769.71 in favor of the then holder of the first mortgage and against the petitioners. The judgment also declared that there was due and owing the sum of $3,621.27 to the County of Walworth for back taxes (R. 107-111).

Although the petitioners could have redeemed the property during the eleven year period commencing with the day the judgment of foreclosure was entered and terminating with the confirmation of sale to the respondent, they did not do so. In addition, Mr. Hahn, one of the petitioners, never paid real estate taxes on the said property during this period (R. 101).

In February of 1960, Mr. Hahn deeded his interest in the property to Oriental Trading Corporation, which he wholly owned (R. 222). A notice of foreclosure sale dated June 22, 1960, was filed with the court (R. 113), but the sale was not held. In January of 1961, Oriental Trading Corporation deeded the property to Carol Lingott as security for a $10,000.00 loan (R. 222). On April 20, 1964, an order was entered substituting John Bihlmire as plaintiff as the assignee of Lloyd D. Miller. That same order added to the judgment taxes, interest and charges which had been paid by the mortgagee for the years 1950 through 1962, together with interest on the judgment, so that the mortgage amount was increased to $21,217.37 (R. 113-114). Thereafter, a sale was noticed and held on June 9, 1964. The sheriff's report of sale stated that the premises were struck off to the highest bidder, who was Byron Hahn, for the sum of $35,000.00 and the purchaser paid the sum of $4,000.00 as a deposit (R. 117-118). On July 6, 1964, Mr. Hahn paid Carol Lingott $5,000.00 and added $5,000.00 to the amount of the mortgage which she held on another parcel of property known as Stone Manor and Mrs. Lingott deeded the property back to Mr. Hahn (R. 222-223). On July 10, 1964, Mr. Hahn deeded the property to Jhung Do Corporation (R. 223).

Thereafter, a notice of application to confirm the sheriff's sale dated November 30, 1964, was served and filed (R. 119). The hearing on confirmation was held and the court entered the order confirming the sale on December 7, 1964 (R. 119). The order provided that Mr. Hahn, as the highest bidder, should pay the balance of the purchase price into court within ten days and that in the event Mr. Hahn failed to pay the balance of $31,000.00 into the court within the time set by the court,

the $4,000.00 would be forfeited (R. 120-121). Mr. Hahn did not pay the balance of the purchase price.

On January 7, 1965, a deed was recorded transferring the property back from Jhung Do Corporation to Mr. Hahn and on the same day a deed was recorded transferring the property from Byron Hahn and his wife to Transasia Trading Corporation (R. 223). On May 14, 1965, another order for sale of real estate was entered (R. 136) and the sale was noticed to be held on July 1, 1965. The said sale was held and the premises were struck off to John W. Bihlmire for $29,000.00 (R. 142). After an adjournment, the hearing on confirmation was held on August 5, 1965, at which time counsel for Mr. Hahn and Transasia Trading Corporation requested a further adjournment which the court denied (R. 160-163). Judge Zastrow ruled that the said sale should be confirmed (R. 101-106).

Petitioners, on page 7 of the petition, make reference to the securing of a mortgage commitment from First Federal Savings & Loan Association of Racine for $40,000.00. The implication is that this commitment was secured prior to December 8, 1964, the date on which the court gave the petitioners ten days in which to pay the balance owing. In fact, the application for the loan to First Federal Savings & Loan Association of Racine was dated July 29, 1965 (R. 169). At this time, petitioners' rights to purchase the property had already been forfeited (R. 120-121), and the property had been sold to the respondent (R. 142). In addition, at the time the application was made, the petitioners could not have even redeemed the property since they had previously transferred title to Transasia Trading Corporation (R. 223).

Petitioners also allege, on page 7 of their petition, that the court ordered a resale of the property with a min-

imum deposit of $10,000.00. This is in error. All that the court did was amend the judgment to remove the requirement that a minimum deposit of $4,000.00 would be required (R. 126-127). In Wisconsin, the amount of the deposit on a resale is discretionary with the sheriff and the County Court recognized this fact (R. 126-127).

Finally, petitioners state, on page 18 of their petition, that the Walworth County Court is informally withholding consummation of the sale to respondent pending the outcome of this petition. There is nothing in the record to support this contention nor is it correct. In fact, the sale has been consummated and all that remains is a determination as to the disposition of the funds on hand. Since this determination would of necessity require a finding as to the attorneys' fees, the County Court cannot proceed until this matter is determined so that attorneys' fees involved can be computed.

ARGUMENT

I.

This Court Lacks Jurisdiction to Examine the Decision of the Wisconsin Supreme Court on Two of the Three Grounds Asserted by Petitioners

The petitioners cite 28 USC, Sec. 1257(3) as the statutory provision which confers jurisdiction upon this Court to review, by writ of certiorari, the decision of the Wisconsin Supreme Court in the case of *Bihlmire v. Hahn, et al,* 31 Wis. (2d) 537, 143 N.W. (2d) 433 (1966). That part of 28 USC, Sec. 1257 relied upon by the petitioners, provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had,

> may be reviewed by the Supreme Court as follows: . . . (3) by writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The rights claimed upon which the petitioners rely for the granting of a writ of certiorari involve a denial to the petitioners of a fair trial within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution and a conflict in the procedures of the Wisconsin courts and the United States District Court for the Eastern District of Wisconsin in a pending bankruptcy action. The alleged denial of a fair trial arises out of the refusal of the trial court to disqualify itself or terminate certain communications written by the respondent and also the exclusion of certain evidence concerning the respondent and his connection with a bankruptcy proceeding instituted against one of the petitioners.

Before discussion can be had on the merits of petitioners' allegations, we must first ascertain whether this Court can consider, on a petition for a writ of certiorari, those federal questions presented by the petitioners. Under 28 USC, Sec. 1257(3), it is a jurisdictional requisite for a writ of certiorari that the title, right, privilege or immunity claimed and which is referred to as the federal question, shall have been specially set up or claimed in the state court proceeding. *Oxley Stave Company v. Butler County,* 166 U.S. 648 (1897), *Dewey v. Des Moines,* 173 U.S. 193 (1899), *Hiawassee River Power Company v. Carolina-Tennessee Power Company,* 252 U.S. 341 (1920).

As stated in *Hulbert v. City of Chicago,* 202 U.S. 275, 276 (1906):

> "In order to give this court the power to re-examine the judgment of the state court, the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way, and the right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claim."

As to what is meant by the term "specially set up or claimed", this Court in *Oxley Stave Company v. Butler County,* 166 U.S. 648 (1897), interpreted these words, when contained in a prior enactment, to mean as follows (p. 655):

> "The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially', that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference . . . . The jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

From the foregoing, it is clear, that the petitioners' right to rely on the federal questions asserted as grounds for certiorari under 28 USC, Sec. 1257(3) and this Court's jurisdiction to entertain a petition for a writ of

certiorari upon these grounds, is dependent upon whether these federal questions were specially set up or claimed in the state court. If in fact these questions were never presented to the state court, then this Court lacks jurisdiction to grant the petition for a writ of certiorari.

Petitioners, on page 18 of their petition, assert that the federal questions relied upon were raised in the state court proceedings. They allege that the question concerning the collusive instigation of bankruptcy proceedings was raised in the trial court by offer of proof (R. 205-207) and "cited as point 9 . . . in the respondent's brief". It is apparent that petitioners' reference to the respondent's brief is in error and the petitioners really meant point 9 of appellant's brief. It is clear from a review of this brief, which we believe is part of the record in these proceedings, that the petitioners never claimed in the said brief to the Wisconsin Supreme Court that the evidentiary ruling made by the trial court concerning the instigation of the bankruptcy action against one of the petitioners violated the petitioners' rights for a fair trial within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution. Also, the brief and the record is silent as to any claim by the petitioners that the procedure of the Wisconsin court was in conflict with the procedure of the United States District Court for the Eastern District of Wisconsin or was in conflict with any rights conferred upon the petitioners by a federal statute.

Point 9 of the appellant's brief, while alleging as error the failure of the court to receive evidence with respect to the instigation of the bankruptcy proceedings against one of the petitioners, asserted that the ruling that the said evidence was privileged within the meaning of Wisconsin Statutes, Sec. 325.22 (1963) was erroneous. The

brief is silent as to any authority or argument concerning a claim by the petitioners that the said evidentiary ruling violated their rights under the Fourteenth Amendment to the United States Constitution or that the Wisconsin procedure conflicted with the federal jurisdiction or abridged a right of the petitioners conferred by federal statute.

It is well settled in Wisconsin, that questions not briefed or argued will not be considered by the appellate court. *Public Service Employees Union v. Wisconsin Employment Relations Board,* 246 Wis. 190, 16 N.W. (2d) 193 (1944). Petitioners assert that these questions were argued but were never referred to or affirmatively passed on in the decision of the Wisconsin Supreme Court. A review of the record and of the appellant's brief submitted to the Wisconsin Supreme Court shows conclusively that these questions were never before the Court. As stated in *Keokuk & Hamilton Bridge Company v. Illinois,* 175 U.S. 626 (1900):

> "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it."

The third federal question involves a claim by the petitioners that they were denied a fair trial within the meaning of the Fourteenth Amendment of the United States Constitution by the trial judge's failure to disqualify himself or terminate the writing of certain letters by the respondent, which communications are set forth on pages 13 through 18 of the petition. This point was argued to the Wisconsin Supreme Court in the appellant's brief and, therefore, this Court would have jurisdiction to re-examine the judgment of the Wisconsin Supreme Court on this point alone.

The fact that the petition did raise one federal question before the Wisconsin Supreme Court, would not, however, justify the petitioners in arguing the additional federal questions set forth in their petition which are not connected with the federal question raised. This would be the case even though the record discloses facts upon which these questions might have been raised. *Dewey v. Des Moines,* 173 U.S. 193 (1899), *Keokuk & Hamilton Bridge Company v. Illinois,* 175 U.S. 626 (1900).

II.

Petitioners Waived Statutory Right to Have Case Heard by Another Trial Judge so They Cannot Claim Denial of Such a Right

During the course of the litigation, the respondent initiated various communications to the trial judge which are set forth on pages 13 through 18 of the petition. Each of these communications was made part of the record by the trial judge as can be seen from the citations to the record contained in the petition. In addition, the petitioners and their counsel were informed of the contents of these communications by the Court.

Although these communications were set forth in great particularity by the Court, the petitioners did not then assert that they were unable to secure a fair hearing from Judge Zastrow. They made this contention for the first time on the appeal to the Wisconsin Supreme Court.

Wisconsin Statutes, Sec. 261.08(1) (1963), provides that any party who has good reason to and does believe that he cannot have a fair trial because of the prejudice of the judge, can secure another judge to preside. No such affidavit was ever filed in this case against Judge

Zastrow by any party. The statute provides the mechanism for disqualifying the presiding judge in any given matter. If a litigant feels he is unable to receive a fair and impartial trial from a presiding judge, he may invoke the applicable statute and have the judge disqualified from hearing any further proceedings. However, under our system of justice an individual cannot wait to see the results of his case to determine whether he wants to file an affidavit of prejudice against the presiding judge. The petitioners had numerous opportunities to file an affidavit of prejudice against Judge Zastrow if they so desired. They did not choose to do so at any time throughout the entire history of these proceedings and should not be allowed to complain at this point in the proceedings that they were unable to get an impartial decision from Judge Zastrow.

In the case of *Baker v. Mueller,* 222 F. (2d) 180, 183 (7th Cir.) (1955), the Court stated:

> "In his brief in this court plaintiff contends that the district judge should have disqualified himself to sit in this case. This point was not raised before the district court and comes too late in this court."

The petitioners were fully appraised of the various communications during the course of the litigation. Since a procedure was available to the petitioners to have the proceedings transferred if they felt the judge would not be impartial, and since the petitioners could have objected to the competency of the judge but chose not to do so, they cannot now be heard to claim that they were denied a fair hearing. The right to correct the alleged abuse was present and the petitioners by not availing themselves of this right, waived any objection to the qualifications of Judge Zastrow and waived any

claim that they might have had that they were denied a fair hearing.

CONCLUSION

Respondent respectfully submits that for the reasons heretofore set forth, the petition for a writ of certiorari should be denied.

Respectfully submitted,

IRVIN B. CHARNE

Attorney for Respondent,
John W. Bihlmire